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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL GARCIA NUNEZ, Defendant and Appellant.	F053493 (Super. Ct. No. F07900749) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found that appellant Miguel Garcia Nunez stole a Fresno woman's purse at gunpoint. The victim, Maria Pacheco, was able to positively identify appellant as the man who robbed her. The jury also heard evidence of uncharged misconduct, which the trial court admitted on the ground that it tended to show a "common plan or design" because of the type of property involved in each case (i.e., credit cards and checkbooks). On appeal, appellant contends, among other things, that the trial court erred by admitting the evidence of uncharged offenses and failing to properly instruct the jury regarding such evidence. We disagree and accordingly affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On November 19, 2006, at 6:30 a.m., Maria Pacheco arrived for work at La Estrella Bakery in the City of Fresno. When she parked her car in the parking area adjacent to the bakery, she noticed a man was seated in a blue car that appeared to be a Taurus. As Ms. Pacheco walked toward the bakery, the man drove the blue car in front of her path, pulled out a gun and told her two or three times in Spanish, "'give me your fuckin' purse.'" Ms. Pacheco handed over her black purse and the robber drove away. Ms. Pacheco recalled that the man was in his early twenties, Hispanic, wore a hooded sweatshirt and a baseball hat, and had "a very penetrating gaze." At trial, she identified appellant as the robber and said she was "sure it [was] him."

Leonardo Portillo lived in an apartment complex that was only four or five blocks from the bakery. At 6:30 or 7:00 a.m. on the morning of the robbery, Mr. Portillo noticed that a blue Taurus had pulled in behind his own vehicle in an alley outside the apartment. Mr. Portillo saw a Hispanic male, approximately 25-30 years old, wearing a black jacket with a hood pulled over his head, exit the blue Taurus carrying what appeared to be a black purse. Mr. Portillo wrote down the license plate number of the vehicle and had his wife call the police to report what he had seen. However, before the police arrived, a different man and a woman walked into the alley. The woman got into the Taurus and drove away.

On November 28, 2006, Fresno Police Officer Kurt Smith pulled over a blue Taurus. The driver of the vehicle was Saul Rojas. Officer Smith ran a routine check and learned that the Taurus was a suspect vehicle in a recent robbery. Officer Smith observed that the ignition for the Taurus had been "punched out" and he found a black purse in the trunk. Ms. Pacheco was later shown the black purse, but she said it was not hers. When investigating officers had Ms. Pacheco view a photo lineup that included a picture of Saul Rojas, she was unable to identify anyone in the photographs.

On December 18, 2006, around 4:40 a.m., Officer Matt Wilkerson of the Fullerton Police Department pulled over a Plymouth Voyager van for a traffic stop. Juan Mendoza was the driver of the van; appellant was a passenger. Because the van's steering column had been tampered with, Officer Wilkerson believed that the vehicle had been stolen. A search of the vehicle revealed a Bank of America checkbook belonging to Raquel Reyes of Fresno.[1] During a search at the police station, a Wells Fargo Bank credit card belonging to Ms. Pacheco was found in Mr. Mendoza's pocket.

On January 17, 2007, Detective David Fries of the Fresno Police Department showed Ms. Pacheco two more photo lineups, one that included a picture of Juan Mendoza and one that included a picture of appellant. Ms. Pacheco pointed to appellant's picture and indicated that he was the person who had robbed her.

Subsequently, Detective Fries interviewed appellant about the November 19, 2006 robbery. Appellant admitted he was familiar with the blue Taurus, but said it belonged to his friend Mr. Rojas's mother and he denied ever driving it. When Detective Fries stated that he was sure appellant was the robber, appellant hung his head, nodded up and down and said okay. When Detective Fries told him, for the purpose of seeing his response,

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[1] The checkbook had been stolen on October 28, 2006, from Ms. Reyes's car that was parked in front of her house in Fresno.

that the victim claimed he dragged her from the car, he immediately sat up and said that nothing like that ever happened and "[t]hat lady must be crazy."

In appellant's defense, his wife testified that appellant has always had a goatee and a mustache. Appellant's former coworker, Jose Cruz, testified that he had seen Rojas give appellant a ride to work while driving a blue car.

On June 22, 2007, the jury found appellant guilty of second degree robbery (Pen. Code, § 211)[2] and found true the allegation that appellant personally used a firearm during the commission of the robbery (§ 12022.53). The trial court sentenced appellant to 13 years in state prison, consisting of the middle term of three years for the robbery conviction plus an additional 10 years for the firearm enhancement. This appeal followed.

DISCUSSION

I. The Trial Court Properly Admitted Evidence of Uncharged Offense

Appellant contends the trial court prejudicially erred when it allowed the prosecution to introduce evidence of uncharged misconduct in order to establish a common design or plan to steal certain types of property (i.e., checks and credit cards). We begin our analysis with a brief overview of the relevant legal principles.

Character evidence is generally inadmissible when offered to prove conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) However, this rule "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. omitted.) Evidence Code section 1101, subdivision (b), specifies that evidence of other misconduct is admissible when relevant to prove such issues as intent, motive, knowledge, identity, or common plan or design. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "Evidence of uncharged crimes is admissible to prove

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[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*Ibid*.) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*Ibid*.) Under an abuse of discretion standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

In the present case, appellant made a pretrial motion to exclude all evidence of the items seized by Fullerton police officers during the December 18, 2006 vehicle stop, with the exception of Ms. Pacheco's credit card. Apparently, a number of other credit cards, checkbooks and burglary tools were found in the vehicle. Initially, the trial court was inclined to grant appellant's motion because of the dissimilarity between receiving stolen property and the charged offense of robbery. Ultimately, however, the trial court was persuaded by the prosecution's argument that the evidence tended to show "a common plan or design to take certain kinds of property." The trial court would allow such evidence to be introduced, with one significant limitation -- before an item would be allowed as evidence of a common design or plan, the prosecution had to first establish as a foundation that the particular item had, in fact, been stolen. As a result of this limitation, the only evidence that was offered at trial to establish a common design or plan was the Bank of America checkbook that had been stolen from Ms. Reyes.

We believe the evidence of uncharged misconduct was correctly admitted by the trial court for the purpose of showing a common design or plan to steal certain types of property -- specifically, checks and credit cards. Ms. Reyes's checks, which were found in the van along with Ms. Pacheco's credit card (in the driver's pocket), manifested this pattern and allowed a reasonable inference that a distinct plan or design was involved. Just as one thief might repeatedly focus his time and effort on stealing jewels, another

might consistently plan to filch credit cards and checkbooks, as was apparently the case here. "[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.) Because the evidence was adequate to meet this standard, the trial court did not abuse its discretion.

Further, we reject appellant's contention that the evidence was actually introduced to show "identity." That was simply not the case. Appellant's identity was convincingly established by Ms. Pacheco's testimony, and the evidence of other crimes was clearly introduced for the limited purpose of establishing a common plan or design.

II. No Instructional Error Occurred as to Evidence of Uncharged Offense

The trial court instructed the jury with CALCRIM No. 375, which explained how the jury should analyze the evidence of uncharged misconduct. The gist of appellant's argument is that the language of CALCRIM No. 375 "effectively lowered the prosecution's standard of proof." We disagree. The court's instruction not only limited the purposes for which the evidence could be considered, but clearly provided the following explanation to the jury regarding burden of proof: "If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of robbery. The People must still prove each element of the charge beyond a reasonable doubt." Thus, the effect of CALCRIM No. 375 was merely to permit the jury to draw the inference that appellant had a common plan or design, assuming the uncharged offense was established by a preponderance of the evidence.

The jury would still have to determine whether all the elements of the charge were proven beyond a reasonable doubt, as the instruction plainly stated.

Moreover, the same argument was rejected by the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, a case that involved an analogous jury instruction relating to uncharged acts of other sexual offenses. The court found the instruction did not confuse the jury or have the effect of reducing the prosecution's burden. (*Id*. at pp. 1012-1016). The *Reliford* opinion emphasized: "Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense in 1991 involving S.B. The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.]" (*Id*. at p. 1016.) Thus, the jury would have understood that "a conviction that relied on inferences to be drawn from defendant's prior offense would have to be proved beyond a reasonable doubt." (*Ibid*.) For the same reasons, we conclude in the present case that the jury was properly instructed with CALCRIM No. 375.

II. CALCRIM No. 220 Adequately Defined Reasonable Doubt

The trial court instructed the jury on reasonable doubt using CALCRIM No. 220, as follows:

> "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. The defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean, they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.
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> "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

> "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt[,] he is entitled to an acquittal and you must find him not guilty."

Appellant contends that the definition of reasonable doubt in CALCRIM No. 220, when considered in conjunction with CALCRIM No. 222,[3] prevented the jury from considering a *lack* of evidence in deciding whether reasonable doubt existed, thereby denying appellant his federal due process rights. Appellant's contention is without merit. This same challenge to CALCRIM No. 220 has been completely rejected in the numerous published cases that have considered it. (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117-1119; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093; *People v. Hernández Rios* (2007) 151 Cal.App.4th 1154, 1156-1157; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1508-1510.) We fully agree with the analyses of these cases and, for the sake of judicial efficiency, adopt and incorporate them here. Appellant's challenge to CALCRIM No. 220 fails.

It is significant that the trial court's use of CALCRIM No. 220 clearly informed the jury that "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt[,] he is entitled to an acquittal and you must find him not guilty." As we stated in *People v. Flores*, *supra*, 153 Cal.App.4th at page 1093, "[t]he only reasonable understanding of this language is that a lack of evidence could lead to reasonable doubt." Moreover, we observed in that case that "[n]othing about the instructions given implies to the jury that the defendant must adduce evidence that promotes reasonable doubt or that the defendant must persuade the jury of his or her innocence by evidence presented at

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3 Pursuant to CALCRIM No. 222, the jury was instructed to "use only the evidence that was presented in this courtroom."

trial. [Citation.]" (*Ibid*.) The same is plainly true here. We conclude the jury was properly instructed by CALCRIM No. 220.

DISPOSITION

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Dawson, J.